

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.854 OF 2015

WALI AHMED S/O. SHAFI AHMED KAZMI)
SHAIKH)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Ms.Nasreen Ayubi, Appointed Advocate for the Appellant.

Mr.S.V.Gavand, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 7th MARCH 2018

JUDGMENT :

1 The appellant/accused by this appeal is challenging the judgment and order dated 1st August 2015 passed by the learned Additional Sessions Judge, Greater Mumbai, in Sessions Case No.467 of 2013, thereby convicting him of offences punishable under Sections 307 and 394 of the Indian Penal Code. For the offence punishable under Section 307 of the Indian Penal Code, the appellant/accused is sentenced to suffer rigorous

imprisonment for 7 years apart from directing him to pay fine of Rs.20,000/- and in default to undergo rigorous imprisonment for 1 year. For the offence punishable under Section 394 of the Indian Penal Code, he has been sentenced to suffer rigorous imprisonment for 7 years apart from payment of fine of Rs.45,000/- and in default to undergo rigorous imprisonment for 1 year. Substantive sentences imposed on him are directed to run concurrently. He is acquitted of the offence punishable under Section 135 of the then Bombay Police Act.

2 Facts leading to the prosecution of the appellant/accused are thus :

- (a) PW2 Sunil Parihar is owner of the Cloth shop named as “Mahalaxmi Textiles”. In addition to the business of selling clothes, he was doing the business of discounting the Traveler's Cheque. His nephew PW3 Gorkharam Parihar was looking after this business of PW2 Sunil Parihar. Injured PW1 Ramesh Perihar is nephew of PW3 Gorkharam Parihar. He was also working in the shop of PW2 Sunil Parihar.

- (b) On 6th December 2012, PW3 Gorkharam Parihar got a telephone call from a person who disclosed his name as Afzal. He was informed that a Traveler's Cheque for Rs.1 lakh needs to be encashed. PW3 Gorkharam Parihar informed the caller that cash of Rs.40,000/- is available and it will be sent to the National Hotel where the caller informed that he is staying. PW3 Gorkharam Parihar further informed the caller, who disclosed his name as Afzal, that remaining amount would be arranged from Supama Private Limited Agency, and therefore, the Traveler's Cheque be handed over to the person sent along with cash of Rs.40,000/-. The caller – Afzal agreed.
- (c) PW3 Gorkharam Parihar, then, asked his nephew PW1 Ramesh Parihar to deliver cash amounting to Rs.40,000/- to a person named Afzal, staying in Room No.206 of National Hotel, located at Grant Road. Accordingly, PW1 Ramesh Parihar went to Room No.206 of National Hotel located at Grant Road. In response to the ringing of the door bell, one

person opened the door of Room No.206 which was occupied by two persons. PW1 Ramesh Perihar entered in the room and the person who opened the door closed it from inside. He was asked whether he had brought cash. PW1 Ramesh Perihar demanded the Traveler's Cheque. Upon that, the person who opened the door, indulged in scuffle. He was holding a knife. The knife fell from the hands of that person. The another person took the said knife and gave successive blows thereof on legs, stomach and neck of PW1 Ramesh Perihar. By snatching the amount of Rs.40,000/-, a cell phone as well as the Traveler's Cheque of Rs.1 lakh, those persons ran away.

- (d) PW6 Zubaid Ali – waiter working at the National Hotel witnessed the inmates of Room No.206 fleeing from the hotel and had also witnessed clothes of the appellant/accused stained with blood. Attempt to chase and apprehend them by him as well as his co-workers proved futile. In the meanwhile, other employees of the National

Hotel approached Room No.206 and found injured PW1 Ramesh Perihar in a pool of blood. He disclosed the incident to them. Injured PW1 Ramesh Perihar also informed the incident to PW3 Gorkharam Parihar telephonically. The injured was then taken to Bhatia Hospital for medical treatment.

- (e) On getting the information about the incident, PW18 Vishwajeet Jagtap, Assistant Police Inspector, attached to D.B.Marg Police station, visited Room No.206 of the National Hotel and on getting information that the injured was shifted to Bhatia Hospital, he rushed to Bhatia Hospital and recorded the First Information Report (FIR) Exhibit 11 in the form of statement of the injured at Bhatia Hospital on 6th December 2012 itself.
- (f) After registration of Crime No.326 of 2012 at D.B.Marg Police Station, Mumbai, routine investigation followed. The spot was inspected and the panchnama thereof came to be

recorded. Articles found on the spot came to be seized. Similarly, photocopy of the Pan Card kept by PW5 Iqbal Gadhawalla - Accountant, and PW6 Zubaid Ali – Waiter, while allotting the room at the National Hotel to accused persons, along with the Register and Receipt book of the hotel came to be seized. Necessary inquiry recording holder of the said Pan Card was made from the Income Tax Department by PW19 Pandurang Sanas, Assistant Police Inspector, who conducted the part of the investigation. The appellant/accused came to be arrested. However, the co-accused could not be arrested. On completion of investigation, the appellant/accused came to be charge-sheeted.

- (g) The learned trial court framed and explained the Charge and the appellant/accused pleaded not guilty. In order to bring home the guilt to the appellant/accused, the prosecution has examined in all 19 witnesses. The defence of the appellant/accused, as seen from the line of cross-

examination of prosecution witnesses as well as from his statement under Section 313 of the Code of Criminal Procedure, was that of total denial. After hearing the parties, by the impugned judgment and order, the learned trial court convicted the appellant/accused for offences punishable under Sections 307 and 394 of the Indian Penal Code. Accordingly, he is sentenced as indicated in the opening paragraph of this judgment.

3 I have heard Ms.Nasreen Ayubi, the learned advocate appointed to represent the appellant/accused at the cost of the State. She argued that, as seen from communication sent by the appellant/accused from jail to this court, he is suffering from HIV+ve and is on Anti Retroviral Therapy in the jail. The report of the Jail Authority called by this court also indicates this fact. Not only this, the said fact was also communicated by the appellant/accused when he was heard on the quantum of sentence by the learned trial court. However, still, harsh sentence of imprisonment as well as fine is imposed on the

appellant/accused. The same is not justifiable in the wake of the fact that during the trial itself, it was found that the appellant/accused is suffering from AIDS.

4 Ms.Ayubi, the learned advocate further argued that PW1 Ramesh Perihar is not a witness of truth, as the Traveler's Cheque was not robbed from him. She further argued that evidence of PW19 Pandurang Sanas, Assistant Police Inspector, shows that PW1 Ramesh Perihar was not in a position to give his statement on 8th December 2012. This fact indicates that even on 6th December 2012, he was not in a position to make a statement and as such, the FIR Exhibit 11 is a suspicious document. The learned advocate further criticized evidence of PW11 Rakesh Choudhari as unbelievable and unnatural by submitting that there was no point in keeping an amount of Rs.10,000/- with this witness by the appellant/accused.

5 As against this, the learned APP supported the impugned judgment and order of conviction and the resultant

sentence by arguing that evidence of the injured witness is clear, cogent and consistent. It is gaining corroboration from other evidence adduced by the prosecution. As such, no infirmity can be found in the conviction of the appellant/accused. The learned APP justified the substantive sentences, so also the imposition of fine by the learned trial court by contending that the same is perfectly justifiable in the facts of the case.

6 I have carefully considered the rival submissions and also perused the Record and Proceedings including deposition of prosecution witnesses and the documentary evidence adduced by the prosecution.

7 It is case of the prosecution that the appellant/accused along with co-accused had attempted to commit murder of PW1 Ramesh Perihar and committed robbery by looting cash and valuables from him. PW1 Ramesh Perihar is an injured witness. Evidence of PW16 Dr.Pratik Samdani of Bhatia Hospital shows that he had suffered injury on the neck of size 12 x 2 x 3 cms.,

injury on left side of lower chest and lower abdomen of size 1 x 1 x 7-8 cms. as well as Contused Lacerated Wound (CLW) on right scalp of size 1 x 0.5 x 1 x 0.5 cms. In the matter of **Bonkaya V/s. State of Maharashtra**¹, the Honourable Apex Court has held that injured witnesses are stamped witnesses whose presence admits no doubt as being themselves victims, they did not leave the real assailants and substitute them with innocent persons. By now it is well settled that evidence of injured eye witness cannot be disbelieved, even on the ground of inimical disposition towards the accused or improbabilities of narrating the details of actual assailant. If a witness who is a natural one and is the only possible eye witness in the circumstances of a case, then, such witness cannot even be termed as an interested witness. If evidence of such injured witness is otherwise reliable and trustworthy, then it carries great weight and does not even require corroboration by any independent witness. If evidence of injured PW1 Ramesh Perihar is tested on this touchstone, then, I am unable to persuade myself that the same is suffering from any infirmity or lacuna. In clear terms, this witness has deposed that

¹ 1995 (2) SCC 477

as per directions of PW3 Gorkharam Parihar, he had been to Room No.206 of National Hotel, situated at Grant Road, at about 8 p.m. of 6th December 2012. He rang the door bell and out to two inmates of the said room, one opened the door. He further deposed that upon his entry in the room, the door was closed, and thereafter, he was asked whether he had brought the cash. Upon getting affirmative answer, one person from that room, indulged in scuffle with him while holding a knife. When the knife fell from the hands of that person, it was lifted by the another inmate of that room. He was then pushed on the bed and was assaulted by means of that knife on legs, stomach and neck. His mouth was gagged. Those two persons then took his cell phone, Traveler's Cheque and cash of Rs.40,000/-. They, then, ran away. Thereafter, in a short time, two persons came. He narrated the incident to his uncle PW3 Gorkharam Parihar and then he was taken to Bhatia Hospital where his FIR Exhibit 11 came to be recorded. This witness has duly identified the appellant/accused as the person who assaulted him by means of a knife. He also identified his clothes and other articles.

8 In cross-examination of this injured witness, an attempt was made to doubt the identity of the appellant/accused by suggesting to this witness that the accused person before the court is Afzal. PW1 Ramesh Perihar has stated in cross-examination that the appellant/accused present in the court is Afzal Shaikh. The effect of this statement can be considered when one considers the evidence of PW3 Gorkharam Parihar as PW1 Ramesh Perihar was not knowing who was inmate of the room and the accused were totally unknown to him.

9 Evidence of PW3 Gorkharam Parihar categorically shows that at about 7 – 7.30 p.m. of 6th December 2012, he got a phone call from a person, who disclosed his name as Afzal. That person requested him that he wanted to encash a Traveler's Cheque of Rs.1 lakh. PW3 Gorkharam Parihar informed the caller, who disclosed his name as Afzal, that he will sent cash of Rs.40,000/- and on receipt of that cash, the Traveler's Cheque be handed over to the bearer and the remaining amount would be arranged from Supama Private Limited Agency. Afzal agreed for

the same, and therefore, as stated by PW3 Gorkharam Parihar, he sent PW1 Ramesh Parihar along with cash amounting to Rs.40,000/- to the person who told his name as Afzal, and who was staying in Room No.206 of National Hotel at Grant Road. In the wake of this evidence, no infirmity in the evidence of PW1 Ramesh Parihar could be found though he has named the appellant/accused sitting in the dock as Afzal. That was the name by which his uncle PW3 Gorkharam Parihar had received a call and was requested to send the amount of Rs.40,000/- for discounting the Traveler's Cheque. The accused introduced himself as Afzal to PW1 Ramesh Parihar and presented himself before him as Afzal. As such, this minor discrepancy, which is flowing out because of mis-description of his identity by the appellant/accused, cannot cast a shadow of doubt on version of PW1 Ramesh Parihar.

10 PW5 Iqbal Gadhawalla was Accountant whereas PW6 Zubaid Ali was working as Waiter at the National Hotel where PW1 Ramesh Parihar went to deliver cash of Rs.40,000/- against

the Traveler's Cheque. Evidence of both these witnesses shows that on 6th December 2012, two persons came and asked about availability of a room. Those were taken care of by PW6 Zubaid Ali – Waiter. He obtained Pan Card from those customers, took entry in the Register of the hotel, got that Pan Card photocopied, kept in the Register of the hotel and issued receipt of Rs.600/- to them by getting that amount. PW5 Iqbal Gadhawalla, Accountant, is confirming this fact. Thereafter, PW5 Iqbal Gadhawalla left for Namaz. What happened thereafter, is then disclosed by PW6 Zubaid Ali. As per his version, after occupying Room No.206, allotted to them, by those two customers, one person went to Room No.206. Within minutes he heard noise of screams from Room No.206. PW6 Zubaid Ali further deposed that he, therefore, went to Room No.206 and knocked the door. Then there was silence. He, therefore, came down. Within few minutes, one of the customers of the hotel came down followed by another customer, whose clothes were found to be stained with blood. They both ran away from the hotel. PW6 Zubaid Ali deposed that he along with co-worker attempted to apprehend both those

persons but they ran away. On returning to the hotel, he then went to Room No.206 and found the visitor in an injured condition. As per version of PW6 Zubaid Ali, the visitor informed him that those two inmates of the room assaulted him, looted cash of Rs.40,000/- as well as a cell phone from him and ran away. Police were then summoned to the hotel. As per version of this witness, during the course of investigation, he had handed over photocopy of the Pan Card of that customer, register as well as receipt book to the police. Despite searching cross-examination, nothing could be brought on record of this witness to doubt his testimony. This witness has duly identified the appellant/accused to be a person named Vali Ahmed, who had supplied his Pan Card while getting the room in the National Hotel booked.

11 Evidence of PW18 Vishwajeet Jagtap, Assistant Police Inspector, as well as that of panch witness PW4 Sarfraj Supariwala shows that the room in which the incident in question took place, was inspected on the date of the incident itself i.e. on 6th

December 2012. Blood was spilled on the floor, on bed-sheet as well as pillow covers of the said room. It is also seen from their evidence as well as contemporaneous document i.e. spot panchnama Exhibit 16 that that a rexin bag containing photocopy of the Pan Card issued in the name of Vali Ahmed, form of the Insurance Company etc. were found lying in the room. Those articles were seized vide panchnama Exhibit 16.

12 PW19 Pandurang Sanas, Assistant Police Inspector, as seen from his evidence, had made further investigation in respect of the photocopies of the Pan Card found on the spot as well as with the hotel. Ultimately, during investigation, the Investigator was successful in getting the documents such as application for issuance of Pan Card as well as supporting documents (Exhibit 54). Perusal of these documents show that the application for issuance of such Pan Card was made by the appellant/accused. He had supplied photocopy of that Pan Card while booking the room in National Hotel and one photocopy of his Pan Card was also found in the rexin bag lying on the spot of the incident.

Original Pan Card, as seen from evidence of PW6 Zubaid Ali, was returned to the appellant/accused after booking the room. The photocopy thereof was, however, obtained by mechanical process comparing from the original and as such, the photocopy of the Pan Card produced on record by the prosecution can be read in evidence and it shows that the same was of the Pan Card of appellant/accused Vali Ahmed. That apart, PW6 Zubaid Ali has duly identified the appellant/accused as the person who booked the room in the National Hotel and who after the incident ran away from the said room with blood stained clothes. Entry in the hotel Register Article 9 seized by the Investigator during the course of investigation, which is in the handwriting of PW6 Zubaid Ali, shows that Room No.206 of the National Hotel was booked in the name of appellant/accused Vali Ahmed.

13 Thus, the substantive evidence of PW1 Ramesh Perihar – an injured witness, as well as that of PW6 Zubaid Ali – waiter of the National Hotel, coupled with the documentary evidence as discussed in the foregoing paragraphs, unerringly points out that

the appellant/accused is Vali Ahmed and he along with co-accused had assaulted injured PW1 Ramesh Perihar inside the room and looted cash of Rs.40,000/- from him. There was no question of looting the Traveler's Cheque of Rs.1 lakh from him, as that cheque was to be handed over in lieu of cash of Rs.40,000/-. However, this discrepancy is a minor discrepancy and cannot throw doubt on evidence of injured witness PW1 Ramesh Perihar.

14 Injuries on person of PW1 Ramesh Perihar caused by the appellant/accused along with co-accused while acting in furtherance of common intention reflects their intention to commit murder of PW1 Ramesh Perihar. Neck as well as chest were the body parts chosen for assault by a knife. In a preplanned manner, PW1 Ramesh Perihar was called to Room No.206 of the National Hotel on the pretext of discounting the Traveler's Cheque. Then he was assaulted by means of a knife, and that too, by choosing vital parts of his body for inflicting injuries. As per evidence of PW16 Dr.Pratik Samdani the injuries sustained by PW1 Ramesh Perihar were sufficient, in the ordinary course of

nature, to cause his death, if he was not treated medically with promptitude. Thus, the assault on vital parts of the body of PW1 Ramesh Perihar was with requisite intention as well as knowledge making out the offence punishable under Section 307 of the Indian Penal Code. The evidence of the prosecution further reflects robbing him of cash amounting to Rs.40,000/- making out the offence punishable under Section 394 of the Indian Penal Code. As such, no infirmity, so far as the resultant conviction for offences punishable under Sections 307 and 394 of the Indian Penal Code, can be found.

15 Let us now examine whether the consequent sentence is proper. It is well settled that it is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was committed. The sentencing court are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence. The sentence is required to be adequate, just and proportionate with

the gravity and nature of the crime. At the same time, circumstances of the accused are also required to be kept in mind while imposing the sentence, as one of the objects of the criminal justice system is to rehabilitate the transgressors and the criminals. In the case in hand, at the time of hearing on the quantum of sentence, the appellant/accused had informed the learned trial court that he is suffering from AIDS. The communication made to this court and the report sent by the Jail Authority do show that the appellant/accused is registered as Sero (HIV Positive) on ART (Anti Retroviral Therapy) at ART Centre, Civil Hospital, Nashik. The appellant/accused, apart from suffering from AIDS is apparently a poor person and the record does not reveal that he has any criminal antecedents. In such a situation, I am of the considered opinion that substantive sentences of 7 years imposed on him needs to be reduced to the sentence of 5 years, particularly in the light of the fact that the learned trial court has not even considered and deliberated on the aspect of the appellant/accused suffering from AIDS.

16 The appellant/accused is sentenced to pay fine of Rs.20,000/- for the offence punishable under Section 307 of the Indian Penal Code and that of Rs.45,000/- for the offence punishable under Section 394 of the Indian Penal Code. In the matter of **Shahejadjkhan Mahebubkhan Pathan vs. State of Gujarat**², the Honourable Apex Court had brought down the substantive sentence of rigorous imprisonment for the period of 15 years to 10 years and default sentence of 3 years to 6 months, in serious offences punishable under the NDPS Act relating to conspiracy and possession of the narcotic drug in commercial quantity. The Honourable Apex Court in the said matter has considered its earlier judgments in the matter of **Shantilal vs. State of M.P.**³ as well as **Adamji Umar Dalal vs. State of Bombay**⁴. In the matter of **Shantilal (supra)** it is held thus, in paragraphs 31 and 32 by the Honourable Apex Court :

“31.....The term of imprisonment in default of payment of fine is not a sentence. It is a penalty which a person incurs on account of non-payment of fine. The sentence is something which an offender

2 2013 (1) SCC 570

3 (2007) 11 SCC 243

4 AIR 1952 SC 14

must undergo unless it is set aside or remitted in part or in whole either in appeal or in revision or in other appropriate judicial proceedings or otherwise. A term of imprisonment ordered in default of payment of fine stands on a different footing. A person is required to undergo imprisonment either because he is unable to pay the amount of fine or refuses to pay such amount. He, therefore, can always avoid to undergo imprisonment in default of payment of fine by paying such amount. It is, therefore, not only the power, but the duty of the court to keep in view the nature of offence, circumstances under which it was committed, the position of the offender and other relevant considerations before ordering the offender to suffer imprisonment in default of payment of fine.”

32 A general principle of law reflected in [Sections 63](#) to [70](#), [IPC](#) is that an amount of fine should not be harsh or excessive. The makers of [IPC](#) were conscious of this problem. The Authors of the Code, therefore, observed;

“Death, imprisonment, transportation, banishment, solitude, compelled labour, are not, indeed, equally disagreeable to all men. But they

are so disagreeable to all men that the legislature, in assigning these punishments to offences, may safely neglect the differences produced by temper and situation. With fine, the case is different. In imposing a fine, it is always necessary to have as much regard to the pecuniary circumstances of the offender as to the character and magnitude of the offence.' (Ratanlal & Dhirajlal's Law of Crimes, 26th Edn., 2007, p. 221)

The authors further stated : (Ratanlal & Dhirajlal at pp.226-227)

'.....when a fine has been imposed, what measures shall be adopted in default of payment? And here two modes of proceeding, with both of which we were familiar, naturally occurred to us. The offender may be imprisoned till the fine is paid, or he may be imprisoned for a certain term, such imprisonment being considered as standing in place of the fine. In the former case, the imprisonment is used in order to compel him to part with his money; in the latter case, the imprisonment is a punishment substituted for another punishment. Both modes of proceeding appear to us to be

open to strong objections. To keep an offender in imprisonment till his fine is paid is, if the fine be beyond his means, to keep him in imprisonment all his life; and it is impossible for the best Judge to be certain that he may not sometimes impose a fine which shall be beyond the means of an offender. Nothing could make such a system tolerable except the constant interference of some authority empowered to remit sentences; and such constant interference we should consider as in itself an evil. On the other hand, to sentence an offender to fine and to a certain fixed term of imprisonment in default of payment, and then to leave it to himself to determine whether he will part with his money or lie in goal, appears to us to be a very objectionable course....

.....We propose that, at the time of imposing a fine, the Court shall also fix a certain term of imprisonment which the offender shall undergo in default of payment. In fixing this term, the Court will in no case be suffered to exceed a certain maximum, which will vary according to the nature of the offence. If the offence be one which is punishable with imprisonment as well

as fine, the term of imprisonment in default of payment will not exceed one-fourth of the longest term of imprisonment fixed by the Code for the offence. If the offence be one which by the Code is punishable only with fine, the term of imprisonment for default of payment will in no case exceed seven days.”

17 In the matter of Palaniappa Gounder vs. State of T.N.⁵, the Honourable Apex Court has considered the issue of sentence in default of payment of fine and has held that legitimacy is not to be confused with propriety and the fact that the court possesses a certain power does not mean that it must always exercise it. It is further held that though there is power to combine a sentence of death with a sentence of fine, that power is to be sparingly exercised because the sentence of death is an extreme penalty to impose and adding to that grave penalty a sentence of fine is hardly calculated to serve any social purpose. The Honourable Apex Court also observed that, infact, the common trend of sentencing is that even a sentence of life

5 (1977) 2 SCC 634

imprisonment is seldom combined with a heavy sentence of fine. These observations were relied by the Honourable Apex Court while deciding the case of **Shahejadhkan (supra)** in which the substantive sentence of imprisonment was brought down from 15 years to 10 years and that of default sentence from 3 years to 6 months. Relevant observations of the Honourable Apex Court in the matter of **Shahejadhkan (supra)** can be found in paragraphs 12, 13 and 15, which read thus :

“12 It is clear and reiterated that the term of imprisonment in default of payment of fine is not a sentence. To put it clear, it is a penalty which a person incurs on account of non-payment of fine. On the other hand, if sentence is imposed, undoubtedly, an offender must undergo unless it is modified or varied in part or whole in the judicial proceedings. However, the imprisonment ordered in default of payment of fine stands on a different footing. When such default sentence is imposed, a person is required to undergo imprisonment either because he is unable to pay the amount of fine or refuses to pay such amount. Accordingly, he can always avoid to undergo imprisonment in default of payment of fine

by paying such an amount. In such circumstance, we are of the view that it is the duty of the Court to keep in view the nature of offence, circumstances in which it was committed, the position of the offender and other relevant considerations such as pecuniary circumstances of the accused person as to character and magnitude of the offence before ordering the offender to suffer imprisonment in default of payment of fine. The provisions of Sections 63 to 70 of IPC make it clear that an amount of fine should not be harsh or excessive. We also reiterate that where a substantial term of imprisonment is inflicted, an excessive fine should not be imposed except in exceptional cases.”

“13 While taking note of the above principles, we are conscious of the fact that the present case is under the NDPS Act and for certain offences, the Statute has provided minimum sentence as well as minimum fine amount. In the earlier part of our judgment, taking note of the fact that the appellants being the first time offenders, we imposed the minimum sentence, i.e., 10 years instead of 15 years as ordered by the trial Court. In other words, the appellants have been ordered to

undergo substantive sentence of RI for 10 years which is minimum.”

“15 It is clear that clause (b) of sub-section (1) of Section 30 of the Code authorizes the Court to award imprisonment in default of fine up to 1/4th of the term of imprisonment which the Court is competent to inflict as punishment for the offence. However, considering the circumstances placed before us on behalf of the appellants-accused, viz., they are very poor and have to maintain their family, it was their first offence and if they fail to pay the amount of fine as per the order of the Additional Sessions Judge, they have to remain in jail for a period of 3 years in addition to the period of substantive sentence because of their inability to pay the fine, we are of the view that serious prejudice will be caused not only to them but also to their family members who are innocent. We are, therefore, of the view that ends of justice would be met if we order that in default of payment of fine of Rs.1.5 lakhs, the appellants shall undergo RI for 6 months instead of 3 years as ordered by the Additional Sessions Judge and confirmed by the High Court.”

18 In the wake of this law laid down by the Honourable Apex Court as well as in view of the fact that the appellant/accused is a first time offender having no criminal antecedent and is suffering from AIDS as well as the fact that he appears to have already undergone major part of the substantive sentence, I am of the considered opinion that the default sentence of rigorous imprisonment for 1 year imposed on both counts needs to be scaled down to the simple imprisonment for 3 months on each count. In the result, the following order :

ORDER

- i) The appeal is partly allowed.

- ii) By maintaining the conviction of the appellant/accused for offences punishable under Sections 307 and 394 of the Indian Penal Code, on each count, the appellant/accused is sentenced to suffer rigorous imprisonment for 5 years.

- iii) The fine imposed on the appellant/accused on both counts is maintained.

- iv) However, the default sentence on each count is reduced to simple imprisonment for a period of 3 months on each count.
- v) Similarly, the substantive sentences for both offences are directed to run concurrently.
- vi) If the appellant/accused has undergone the above modified period of sentence by now, he shall be set at liberty, unless he is required in any other offence. If the appellants/accused has not completed the modified period of sentence, he shall be released after the period indicated hereinabove is over.
- vii) A copy of this judgment and order be sent to the concerned Prison where the appellant/accused is lodged and is undergoing sentence.
- viii) The appeal stands disposed of in terms of the above order.

(A. M. BADAR, J.)